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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 678

E. PAUL BLACK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari issue to the Court of Appeals for the Eighth Circuit to review a Judgment entered on October 30, 1962 (Appendix, pg. 29(a), Vol. V, pg. 31).[1] This judgment affirmed one of the United States District Court for the Eastern District of Missouri (Tr. 708, Vol. I, pg. 44).

OPINIONS BELOW.

The District Court prepared no separate opinion, but entered its judgment (Tr. 708) which is unreported. The opinion of the Court of Appeals for the Eighth Circuit (Appendix, pgs. 1 (a)-28 (a), Vol. V, pgs. 1-30) is as yet unreported.

[1] The original record of proceeding certified to the Supreme Court consists of five (5) volumes. Volume I contains the pleadings. Volumes II, III and IV contain the record of trial. Volume V contains the record of proceedings in the Court of Appeals. Except as otherwise stated, citations from Volumes II, III and IV, which contain the record of trial, are referred to as Tr. 1 through 709.

JURISDICTION.

The judgment of the Court of Appeals for the Eighth Circuit, affirming the judgment of the District Court, was entered on October 30, 1962 (Appendix, pg. 29 (a), Vol. V, pg. 31). A petition for rehearing was timely filed and was considered and denied on November 21, 1962 (Vol. V, pg. 32). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

QUESTION PRESENTED.

This petition presents the following question of federal criminal procedure, upon which the decision below conflicts not only with decisions of this Court, but with other Courts of Appeals and with former decisions of the Eighth Circuit Court of Appeals.

The question is this:

(1) When a defendant has offered evidence of his reputation for a previous good character, must not the jury be instructed with respect to the purpose and function of such evidence; its probative status, and that such testimony may alone create a reasonable doubt although without it the other evidence may or would be convincing of guilt?

STATUTE INVOLVED.

The pertinent provisions of the laws of the United States is Title 26, U. S. C., Section 7201, and is as follows:

"Section 7201. **Attempt to Evade or Defeat Tax.**

Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon

conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

STATEMENT.

On March 29, 1961, petitioner was indicted for willful evasion of federal income taxes for the calendar years 1954, 1955 and 1956, respectively (Vol. I, pg. 1). On May 23, 1961, the Government filed a bill of particulars, in which it was stated that the counts of the indictment were based upon (a) the omission in all years of gains from mutual funds; (b) the omission in all years of gains on the sale of lots; (c) omissions in 1955 and 1956 of business receipts from hauling and excavating work; (d) the omission in 1956 of interest income; and the improper deduction of fictional payments for rent of equipment (Vol. I, pg. 33).

Following a trial by jury, petitioner was found guilty on all three counts and sentenced to imprisonment for a period of thirty months, said periods to run concurrently, and fines in the total amount of $5,000.00 (Tr. 708, Vol. I, pg. 44). On appeal petitioner's conviction and sentence were affirmed (Appendix, pg. 29 (a), Vol. V, pg. 31).

The petitioner was born on February 20, 1918, in Elvins, near Flat River, Missouri. He attended a country school for eight years, and the high school in Elvins for two years. He worked for a time in a restaurant in Farmington, Missouri. He then worked for a drilling contractor, and later the St. Joseph Lead Company. While employed by the Lead Company, he worked in the yards, loaded and handled trucks, and learned to use heavy equipment. He quit this job in 1947 and went into business for himself, beginning with one piece of equipment (Tr. 504-506). Shortly thereafter, he entered into a contract with the

Lead Company for transporting chat from its mine dumps to mills of the company for reprocessing (Tr. 510, 511). As his business expanded from time to time, he purchased a substantial amount of additional equipment, including shovels, trucks and bulldozers (Tr. 512). In addition, the petitioner engaged in excavating work, land clearance, bulldozing and miscellaneous hauling and work of a similar nature (Tr. 517, 530, 531).

In order to perform his contract with the St. Joseph Lead Company, petitioner used three trucks of his own (Tr. 509) and rented additional trucks with drivers (Tr. p. 511). Truck rentals and drivers' wages were based upon tonnage hauled (Tr. 513, 514). Because of union trouble, it was determined to run petitioner's trucks in one of his driver's name, who received the payments and endorsed the checks back to petitioner (Tr. 518-523).

Because of his limited education and lack of knowledge of books and bookkeeping, he employed Wynne C. Edmonds as a "Bookkeeper and Tax Consultant", to "set-up" a set of books for him and to keep and maintain his books and records (Tr. 515). He relied on Mr. Edmonds not only for keeping his books and records, but for advice on every major decision and the preparation of his tax returns (Tr. 540, 541, 581).

The business records and books of the petitioner were maintained by Edmonds in the latter's office (Tr. 529), and information concerning tonnage reports and pay roll records, together with the truck rental equipment record was delivered to Edmonds' office each week (Tr. 64, 514). Information from these records were then entered on an employee earning and history record and the total of the pay roll, and allocation was entered in a journal (Tr. 50, 51). At the end of each month a profit and loss statement was prepared (Tr. 64). The information was taken from

the journal and ledger (Tr. 65). At various times, the petitioner asked Mr. Edmonds if he was keeping track of the money involved in the truck transaction, and he was advised that it was recorded (Tr. 524). Mr. Edmonds, as a government witness, was not interrogated on this matter.

From time to time, the petitioner gave Edmonds information of items of miscellaneous income (Tr. 531, 536). Information as to income and disbursements was entered in the journal and ledger (Tr. 197, 198), and the tax returns were prepared from these records (Tr. 452), and all the books were in accord with each other and in accord with the tax returns (Tr. 432).

Petitioner made investments in mutual funds, but during the years involved, no money was received by him, nor could he obtain such money until his account was closed (Tr. 427, 428). He had also made investments in building and loan associations but no information had been given to him about the accumulation of interest on these accounts and such accumulation was not entered until the accounts were closed in 1960 (Tr. 269, 270, 277, 278).

Edmonds prepared the income tax return for each of the years involved from the business books of the petitioner which he maintained (Tr. 158) and petitioner and his wife signed the returns without examining them (Tr. 570, 571).

The income tax investigation began on October 11, 1956 (Tr. 397) with conferences between the Internal Revenue Agent and Mr. Edmonds. Petitioner was not contacted until December, 1957 (Tr. 398). Mr. Edmonds left the Lead Belt October 7, 1957 (Tr. 90) and reappeared as a government witness at the trial beginning September 25, 1961 (Tr. 45).

It was conceded that the purported truck rentals were improper deductions and that the dividends and capital gains from mutual funds were improperly omitted from the returns. Knowledge and intent of petitioner constituted the basic fact issue. Proof of knowledge or lack of knowledge depended primarily on the acceptance by the jury of the testimony of either Mr. Edmonds or Mr. Black, the petitioner.

The petitioner offered the testimony of Judge J. O. Swink, Judge of the Twenty-Fourth Judicial Circuit; Reverend George J. Gottewald, Auxiliary Bishop of St. Louis; and W. L. Bouchard, Newspaper Editor in Flat River, Missouri. Each testified that he had known the petitioner for many years and that his reputation in the community for honesty, veracity, truthfulness and morality was very good (Tr. 607, 612, 614).

REASONS FOR GRANTING THE WRIT.

The Court of Appeals for the Eighth Circuit has rendered a decision which is in conflict with applicable decisions of this court, and which is also in conflict with the decisions of its own circuit and the decisions of the Courts of Appeals for other circuits. Because of the conflict on this question, the determination falls squarely within the supervisory functions of this court to resolve the conflicts, and this court's writ of certiorari should issue because of the importance of this question to criminal procedure in Federal Courts.

The Trial Court gave an instruction concerning the consideration which the jury should give to the evidence of the previous good character of the petitioner (Tr. 699). The instruction reads as follows:

> "Evidence has come into this case of the previous reputation of the defendant—good reputation. If you

should find to your reasonable satisfaction that the reputation of the defendant, before the arising of the facts upon which the present charge was based, was good, then you are to consider such fact, together with all the other facts and circumstances of the case, because the production of such proof goes to the matter of reasonable doubt. It is admitted for the reason that the law decrees that a man of previously good reputation is less likely to commit a crime than one of bad reputation. But if all the evidence in the case, including that which has been given on the matter of previous good reputation, convinces you of defendant's guilt beyond a reasonable doubt, then his previously good reputation cannot excuse, or mitigate, or palliate his guilt to any extent whatsoever."

The following exception to the instruction was timely made (Tr. 704):

"The objection I have to the instruction, your Honor, is this, that it does not tell the jury that reputation alone can create the reasonable doubt, a reasonable doubt sufficient to permit the acquittal of the defendant."

This instruction is in conflict with the decisions of this Court, the decisions of other Circuits, and does not advise the jury of the purpose and function of character evidence, i. e.—that it alone may create a reasonable doubt although without it the other evidence would be convincing of guilt.

The rule is well established that a defendant may offer in evidence his good character and reputation for honesty and integrity to prove the improbability of his commission of the act charged.

This Court in **Edgington v. United States (1896), 164 U. S. 361, 17 S. Ct. 361, 41 L. Ed. 467** reversed a deci-

sion because of an instruction strikingly similar to the one given herein, and laid down the basic rule in the following words:

> "The decided weight of authority now is that good character when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation of good character if it is relevant to the issue, would alone create a reasonable doubt although without it the evidence would be convincing."

The Court in **Michelson v. United States (1948), 335 U. S. 469, 69 S. Ct. 213, 93 L. Ed. 168**, restated the rule this way:

> "He may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury should be so instructed."

The Circuit Court of Appeals, Eighth Circuit, in **Rowe v. United States (C. C. A.-8, 1899), 97 Fed. 779**, followed the rule in the **Edgington** case, and held that evidence of the good character of an accused may itself produce in the minds of the jury a reasonable doubt as to his guilt.

The Circuit Court of Appeals, Eighth Circuit, in **Sundaland v. United States (C. C. A.-8, 1927), 19 F. (2) 202**, was of the opinion that the **Edgington** case did not require an instruction in the exact words of the opinion, but that the rule in said case, laying aside technical verbiage, required an instruction setting forth the following:

> "* * * (1) The purpose and function of such evidence, viz. to generate a reasonable doubt; and set-

ting forth (2) the probative status of such evidence, viz. that it is to be considered whether the other evidence is clear or doubtful; and setting forth (3) the possible effect of such evidence, viz. that when considered with the other evidence, if a reasonable doubt is created as to defendant's guilt, he is entitled to an acquittal."

The requirements were restated by the Court of Appeals, Eighth Circuit in **Salinger v. United States (C. C. A.-8, 1927), 23 F. (2) 48.**

In **Johnson v. United States (C. A.—10, 1959), 269 F. (2) 72,** the Court had under consideration an instruction given by the Trial Court to the effect that if the Jury was satisfied from the evidence offered that he was of good repute prior to the time of the commission of the offense charged in the indictment, it might consider such previous good character along with all the other evidence, facts and circumstances, in determining his guilt or innocence; that good character was not a defense to the crime; and that if the jury should find and believe from all the evidence, including that of good character, beyond a reasonable doubt that the appellant committed the offense with which he was charged, he should be convicted notwithstanding his good character. The Court of Appeals reversed the judgment stating:

> "Believing in the rationale of Edgington v. United States, supra, this Court has held without deviation that when evidence of good character is submitted a jury should be instructed that character testimony may be such that it alone may create a reasonable doubt although without it the other evidence would be convincing of guilt."

The rule was also applied by the same Court of Appeals in **Peterson v. United States (C. A.—10, 1959), 268 F. (2)**

87; **Miller v. United States (C. A.—10, 1941), 120 F. (2) 968; Greer v. United States (C. A.—10, 1955), 227 F. (2) 546.**

The Court of Appeals for the same Circuit reversed the judgment in **Hayes v. United States (C. A.—10, 1955), 227 F. (2) 540,** because the court failed to tell the jury that character testimony may be such that it alone may create a reasonable doubt, although without it the other evidence might be convincing. Certiorari was denied by this Court in **353 U. S. 983, 77 S. Ct. 1290, 1 L. Ed. (2) 1142.**

In **Snitkin v. United States (C. C. A.—7, 1920), 265 F. 489,** the Court of Appeals in the Seventh Circuit, held that the instruction given was erroneous, and stated:

> "Thus the court placed the evidence respecting good reputation on the same basis as the evidence relating to the substantive acts charged in the indictment, and directed the jury to give it such weight as they might think it entitled, without furnishing them the legal scales in which to weigh it, namely that a reputation of good character, if established, alone may create a reasonable doubt, although without it the other evidence would be convincing of guilt. In view of the contest between Schur and plaintiff-in-error over the jury's acceptance of one or the other of their conflicting stories, the error was prejudicial."

The decision in **United States v. Donnelly (C. A.—7, 1950), 179 F. (2) 227,** is to the same effect.

The decisions of the Court of Appeals for the District of Columbia, in **Egan v. United States (1923), 287 Fed. 958, 52 App. D. C. 384, Jones v. United States (1923), 289 Fed. 536, 53 App. D. C. 138,** and **Villaroman v. United States (1950), 184 F. (2) 261, 87 App. D. C., 21 A. L. R. (2) 1074,** are in accord with the principles stated above.

The Court of Appeals for the Second Circuit holds that an instruction wherein the court charges that "it alone could have the effect when considered in connection with other evidence, of generating a reasonable doubt of his guilt when such doubt would not otherwise exist", is a proper statement of the law. **(Kimmell v. United States (C. A.—2, 1960), 274 F. (2) 54; United States v. Crosby (C. A.—2, 1961), 294 F. (2) 928.)**

The Court of Appeals in its opinion (Appendix p. 24 (a); Vol. V, p. 25) recognizes that there is a conflict between the Court of Appeals of the Eighth and the Courts of Appeals of the Seventh and Tenth Circuits in the interpretation to be placed upon the **Edgington** doctrine. The rule as set forth in the Seventh and Tenth Circuits, as stated in the opinion (Appendix p. 24 (a); Vol. V, p. 25), is as follows:

> "* * * Appellants interpretation of **Edgington** is that when a defendant offers evidence of good character, the jury must be instructed that character testimony may be such that it alone may create a reasonable doubt, although without it, the other evidence would be convincing and that failure to give such an instruction constitutes reversible error. Relying on **Edgington**, the Courts of Appeals for the Seventh and Tenth Circuits have adopted such a rule. **However, this Court is one of a majority whose interpretation is to the contrary** * * *" (Emphasis added).

Further on in the opinion, the Court in this case quoted from Sunderland v. United States, 8 Cir., 19 F. (2) 202, 215, as follows:

> "* * * The authorities are in conflict on the question whether a defendant in whose behalf evidence of good character has been introduced, is entitled to an instruction in the exact words used in the opinion in

> the **Edgington** case, viz: 'The circumstances may be such that an established reputation for good character * * * would alone create a reasonable doubt, although without it the other evidence would be convincing' * * * this Court is committed to the negative view * * *".

The Court then went on to state in the opinion the following:

> "* * * Nothing is said by the Supreme Court in **Michelson v. United States, 335 U. S. 469** (wherein at page 476, **Edgington** is discussed) which we interpret as being inconsistent with our interpretation of **Edgington** as expressed in **Sunderland** or which would cause us to recede from our position taken therein."
>
> "Under the cirmustances of this case, we are of the opinion that Appellant was not entitled to the requested instruction and that the instruction given was adequate and correct."

Thus it is clearly admitted by the Eighth Circuit Court of Appeals that a conflict exists among the Circuits as to the proper interpretation and use of the rule announced in **Edgington** and **Michelson**.

It must be remembered, as the Court of Appeals found (Appendix p. 12 (a); Vol. V, p. 12), that the books were kept and maintained and the tax reports prepared by Edmonds; that petitioner did not examine the returns when he signed them; that admittedly items of income were omitted and improper deductions taken. "Knowledge and intent of Black constitute the basic fact" (Appendix p. 10 (a); Vol. V, p. 11). His reputation for good character was a material defense, and in view of the fact that proof of willfulness to evade the tax depended upon the acceptance by the jury of the conflicting testimony of the petitioner and Edmonds, his accountant, petitioner was entitled to an in-

struction which told the jury the purpose and function of character evidence, the probative status of such evidence, and the possible effect of such evidence in creating a reasonable doubt. A failure to so instruct the jury was a miscarriage of justice.

The mere statement that "* * * production of such evidence goes to the matter of reasonable doubt * * *" violates all of the principles of law in regard to character evidence enunciated by this Court in **Edgington** and **Michelson**, as well as those enunciated by various Courts of Appeals. The instruction, as given, was lifeless and tended to discount the value of the character evidence. The Court should have said that the evidence may itself, when considered with other evidence, generate, create or raise a reasonable doubt.

A defendant tried for a like offense in the Eighth Circuit is entitled to the same treatment as one tried in the Seventh or Tenth Circuits.

CONCLUSION.

The issue raises an important question in the uniform administration of criminal justice and the petition for a writ of certiorari should be granted.

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